United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING

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75-1287

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1287

UNITED STATES OF AMERICA,
Appellee,

—against—

MANUEL RODRIGUEZ, a/k/a MANOLO RODRIGUEZ,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

PETITION FOR REHEARING

DAVID G. TRAGER,
United States Attorney
Eastern District of New York

PAUL B. BERGMAN,
PAUL F. CORCORAN,
Assistant United States Attorneys,
Of Counsel.

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee,

-against-

MANUEL RODRIGUEZ, a/k/a
Manolo Rodriguez,

Appellant.

Docket No.

75-1287

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PETITION FOR REHEARING

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PRELIMINARY STATEMENT

The UNITED STATES OF AMERICA, by DAVID G. TRAGER, United States Attorney for the Eastern District of New York, hereby petitions for rehearing by a panel of this Court (Circuit Judges Lumbard, Friendly and Mulligan) of the decision in this matter entered March 11, 1976, which reversed a judgment of the United States District Court for the Eastern District of New York (Platt, J.) convicting appellant of four counts of harboring illegal aliens in violation of Title 8, United States Code, Section 1324(a)(3). The petition for rehearing is filed pursuant to Rule 40 of the Federal Rules of Appellate Procedure.

STATEMENT OF FACTS

Acting on information that there were illegal aliens present at 18 Bunting Lane, Levittown, New York, a four-man investigative team of Immigration and Naturalization Service agents (hereinafter INS) proceeded to that address at approximately 7:00 A.M. on February 12, 1975. Upon arrival, the agents encountered and arrested Jorge Galeas, an illegal alien who was sitting in a car in front of the premises, a single-family dwelling in the suburban Long Island community.

Questioning of Galeas revealed that his passport, a document necessary for expeditious deportation, was located inside the premises known as 18 Bunting Lane. When agents accompanied the detained illegal alien into the house for the purpose of obtaining his passport, they immediately encountered a second illegal alien, one Alba Rivas. Retrieval of Rivas's passport from a first floor bedroom led to the encounter and arrest of a third illegal alien, Jose Caballero. Thereafter, having probable cause to believe there were other illegal aliens present in the house, the four INS agents conducted a limited search of the premises, during which they discovered and arrested

an additional six illegal aliens. Indeed, all of the persons found in the house were illegal aliens; appellant was not present at the time of the search.

Prior to the trial of appellant, the owner of 18 Bunting Lane, on charges of harboring the illegal aliens arrested on February 12th, a suppression motion was made, directed at any and all testimony by or about the illegal aliens located in appellant's premises. After a suppression hearing, the District Court denied appellant's motion on the ground that the INS agents were lawfully on the premises and had properly arrested the aliens encountered.

At trial, appellant was found guilty of knowingly and wilfully harboring four of the nine aliens arrested at 18 Bunting Lane. Among those he was found to have knowingly harbored were Alba Rivas and Jose Caballero, the first two aliens encountered inside the house.

On appeal to this Court, appellant challenged the constitutionality of the harboring provision of Title 8, United States Code, Section 1324, as well as the District Court's denial of his suppression motion. Arguing that the four INS agents deliberately violated his Fourth Amendment rights, appellant claimed that he was the "target" of a criminal investigation, and that the February 12, 1975

warrantless entry into 18 Bunting Lane was pursuant to a preconceived plan to obtain incriminating evidence against him.

In an opinion by Judge Friendly, the majority of this panel rejected appellant's claims that the INS agents unlawfully entered 18 Bunting Lane on the morning in question. Rather, this Court upheld the District Court's findings that the agents' entry was lawful, and that the arrests of the first two illegal aliens encountered by the agents inside the house, i.e., Alba Rivas and Jose Caballero, were proper. United States v. Rodriguez, Slip Op. No. 500, decided March 11, 1976. The majority disagreed with the District Court, however, concerning the constitutionality of the search conducted after the arrest of Rivas and Caballero. Under Chimel v. California, 395 U.S. 752, 773-75 (1969), the majority concluded, the INS agents, though lawfully in the premises, and having probable cause to believe other illegal aliens to be present, could not lawfully conduct a search of the house. Rather, this Court held that the agents "were required to do as best they could to maintain custody of the aliens lawfully arrested and surveillance of the house while a search warrant was being obtained," Slip Op. No. 500, supra at 2593-2594.*

*The purpose of the continued search was to effect the

Based upon error in the District Court's admission of evidence with respect to the search of the house subsequent to Caballero's arrest, the Court reversed appellant's conviction and remanded to the District Court for a new trial "in which the Government will be limited to evidence lawfully obtained" Slip Op. 500, supra at 2594.

(Footnote continued from page 4)

arrest of illegal aliens whom the agents had probable cause to believe were in the house. Illegal aliens are, of course, subject to lawful arrest pursuant to Title 8, United States Code, Section 1357. The majority opinion appears to have overlooked Judge Friendly's observation in United States v. Fernandez, 480 F.2d 726 (2d Cir. 1973), that a warrantless arrest, "even in a dwelling," is permissible, especially where there is no force used.

REASONS FOR GRANTING PETITION

In reversing the instant conviction and remanding for a new trial, this Court found the dispositive issue to be the scope of the search conducted subsequent to the arrest of illegal aliens Alba Rivas and Jose Caballero. Unfortunately, because the appellate issues framed by the parties focused, albeit myopically, upon the legality of the preliminary arrest of Galeas and the entry into the premises, neither side anticipated nor properly briefed or presented its position with regard to the permissible scope of the search or the effect of error resulting from the admission of evidence obtained by an overly extensive serach. Accordingly, we respectfully submit that the proper and efficient administration of justice would be best served by a reargument of this appeal, wherein the parties may belatedly focus upon the depositive issues.

(1)

Worthy of reconsideration, we submit, is the potentially dangerous situation which could develop under the majority's holding that INS agents, under circumstances here present, must attempt to secure the premises and to obtain a warrant.

At the time of Caballero's apprehension, the four

INS agents had in there custody three illegal aliens who had already been placed under arrest. Maintence of custodial supervision of three arrestees would practically necessitate the full attention of at least one or two of the agents present. The task then of securing the premises and obtaining a warrant would fall to the remaining two or three agents. The difficulties attending such a task are evident in the record.

As Chief Judge Kaufman noted in Lennon v. Immigration and Naturalization Service, Docket No. 74-2189 (2d Cir. October 7, 1975), Slip Op. No. 18 at 151, deportation surpasses in severity "all but the most Draconian criminal penalties." Accordingly, illegal aliens faced with the prosepct of impending arrest are at best evasive. Apprehension means almost certain deportation, and thus frustration of considerable effort on the part of the alien. Escape is a tempting alternative.

The instant record evidences the difficulties INS agents regularly encounter. Two of the aliens apprehended at appellant's premises attempted escape after their arrests. Shortly after their entry into the premises, Jorge Gal[illegible]as, the alien arrested outside 18 Bunting Lane, bolted from agents and barricaded himself in a downstairs bedroom. (S.H. March 24, 1975 at pp. 27, 79). Similarly, an alien

arrested at 113 Brittle Lane escaped from the agents and was the subject of a four-block chase (S.H. 3/25/75 at pp. 139, 158, 171). Other aliens were found hiding under a bed (S.H. 3/21/75 at p. 17) and inside a crawl space (S.H. 3/21/75 at p. 19) at 18 Bunting Lane. It is not beyond imagination that had two INS agents attempted to "secure" the premises after Caballero's arrest while the third obtained a warrant, the remaining six aliens at 18 Butning Lane would have attempted to escape, possibly causing injury to themselves or others. Moreover, given the nature of the house, with front and rear doors and multiple windows, the potential for successful escape would have been great.

The Supreme Court has regularly recognized that the Fourth Amendment's warrant requirement as dispensable where its application would frustrate the purpose of the search. Almeida-Sanchez v. United States, 413 U.S. 266 (1973); Chambers v. Maroney, 399 U.S. 42 (1970); Brinegar v. United States, 338 U.S. 160 (1949); Carroll v. United States, 267 U.S. 132, 153 (1925). In Chambers, supra, the Supreme Court ruled that under "exigent circumstances" probable cause alone will justify a warrantless search:

> "In enforcing the Fourth Amendment's prohibition against unreasonable searches and seizures, the Court has insisted upon probable cause as

> a minimum requirement for a reasonable search permitted by the Constitution. As a general rule, it has also required the judgment of a magistrate on the probable-cause issue and the issuance of a warrant before a search is made. Only in exigent circumstances will the judgment of the police as to probable cause serve as a sufficient authorization for a search."

399. U.S. at 51.

We respectfully submit that the exigencies inherent in a confrontation between two INS agents and a larger group of highly mobil illegal aliens are such that the purpose of the proposed search would most surely be frustrated were the agents restricted by the application of a stringent warrant requirement.

(2)

Further consideration by the Court of Appeals would permit argument concerning another principle not anticipated by the parties* -- "harmless error." Rule 52 of the Federal Rules of Criminal Procedure provides that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." This rule is invoked even where the "error" is constitutional magnitude,

*Since appellant and appellee focused on the arrest of Galaes and the entry into the house, it was assumed that all the evidence was either properly or erroneously admitted. Retrial on some of the counts was not foreseen.

provided the error is "harmless" and did not affect the verdict. See eg. Brown v. United States, 411 U.S. 223, 231-32 (1973) [Bruton errors held to be harmless]; United States v. West, 486 F.2d 468, 473 (6th Cir.), cert. denied, 416 U.S. 955 (1973) [admission of illegal seized evidence held harmless]; United States v. Trejo, 501 F.2d 138 (9th Cir. 1974) [use of illegal seized evidence for impeachment held harmless error].

Examination of the instant record establishes the harmless nature of the erroneous admission of testimony by and about the aliens illegally seized. The appellant was charged with twelve counts of knowingly and wilfully harboring illegal aliens.* He did not dispute the fact that he was providing the twelve aliens with shelter, nor did he contest their illegality. The only disputed factual issue at trial concerned appellant's knowledge as to the illegality of each alien harbored.

It is clear from the jury verdict that each count was considered independently. Indeed, the jury acquitted on seven of the eleven counts submitted to them, necessarily finding appellant without knowledge as to the illegal status of those seven aliens. There was clearly no spill-over affect based upon the number of aliens present on the premises.

*With the Government's acquiescence one count was dismissed at the close of the Government's case.

As to the counts on which the jury convicted, there was direct testimony as to appellant's knowledge of the illegal status of those four aliens. Jose Portillo (Count One) and Alba Rivas (Count Six) testified that they actually told appellant they were illegally in the country (Tr. pp. 19, 148). Jose Caballero (Count Two) testified that Rodriguez "had to know he was an illegal alien" (Tr. p. 38). Count Three pertained to Jose Portillo's cousin, Jesus Portillo. The testimony was that Jose Portillo, who had informed appellant of his illegality, arranged with appellant for shelter for his cousin Jesus.

Clearly, then, the admission of evidence of aliens illegality seized was "harmless." Since the jury convicted only on direct evidence of knowledge on appellant's part, the presence of other illegal aliens did not affect the verdict. Having found the appellant not guilty on Counts Four, Five, Seven, Eight, Nine and Twelve, the jury certainly did not use evidence as to those aliens in support of their virdicts on Counts One, Two, Three and Six. Accordingly, the convictions on Counts Two (Jose Caballero) and Six (Alba Rivas) should be permitted to stand.

(3)

Finally, reconsideration by this Court would permit presentation of an issue raised before the District Court (S.H. 3/25/75 pp. 253-254) but not on appeal -- standing. At the time of the suppression hearing, the Government initially challenged appellant's standing to allege Fourth Amendment violation with regard to 18 Bunting Lane. In denying appellant's motion, the District Court did not reach the standing issue, though Judge Platt indicated his "inclination" to think appellant had standing. (S.H. 3/25/75 p. 211).

It is now well established that the Fourth Amendment's prohibition against unreasonable search and seizure protects people rather than property. It is the individual's "reasonable expectation of privacy" against Governmental intrusion which is the subject of constitutional concern. Katz v. United States, 389 U.S. 347 (1967); Alderman v. United States, 394 U.S. 165 (1969); Jones v. United States, 362 U.S. 257 (1960). As the Supreme Court noted in Jones, supra,:

> "In order to qualify as a 'person aggrieved by an unlawful search and seizure' one must have been a victim of a search and seizure, one against whom the search was directed, as distinguished from one who claims prejudice

> only through the use of evidence gathered as a consequence of a sear ch and seizure directed at someone else."

362 U.S. 257, 261 (1960).

In this case, appellant, as a landlord who had relinquished domini on and control over the single-family premises at 18 Bunting Lane to approximately nine adult aliens, would appear to have relinquished simultaneously his standing under the Fourth Amendment. Though he retained a proprietary interest in the property, his possessory interest in the premises was not a present one. Since he had given exclusive use of the property to others, he cannot be said to have retained any expectation of privayc therein. Cf. Rosencranz v. United States, 356 F.2d 310 (1st Cir. 1966).

CONCLUSION

For the above-stated reasons, we respectfully request that the petition for rehearing be granted, the previous order of this Court be vacated and the appeal be reinstated. On the merits, the judgment of conviction should be affirmed, at least as to Count Two and Count Six.

Dated: Brooklyn, New York
April 15, 1976

Respectfully submitted,

DAVID G. TRAGER
United States Attorney
Eastern District of New York

PAUL F. CORCORAN
Assistant U.S. Attorney
Of Counsel.

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS } ss
EASTERN DISTRICT OF NEW YORK

LYDIA FERNANDEZ being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 15th day of April 1976 he served ~~a copy~~ two copies of the within

Petition for Rehearing

by placing the same in a properly postpaid franked envelope addressed to:

Anthony F. Correri, Esq.
50 Mineola Blvd.
Mineola, N. Y. 11501

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, 225 Cadman Plaza East, Borough of Brooklyn, County of Kings, City of New York.

Lydia Fernandez
LYDIA FERNANDEZ

Sworn to before me this
15th day of April 1976

Olga S. Morgan

OLGA S. MORGAN
Notary Public, State of New York
No. 24-4501966
Qualified in Kings County
Commission Expires March 30, 1977